NO.

IN THE SUPREME COURT OF THE UNITED STATES October Term, 1982

WASHINGTON STATE DEPARTMENT OF GAME
Petitioner,

v.

UNITED STATES OF AMERICA
and
QUINAULT INDIAN NATION, et.al.,
Respondent.

On Writ Of Certiorari To The
United States Court of Appeals
For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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The Petitioners State of Washington and Washington Department of Game, hereinafter "Washington", respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on December 7, 1982.

QUESTIONS PRESENTED

1. Can the Quinault Tribe exclude non-members from fishing in navigable waters [1] within the boundaries of the Indian reservation where a substantial portion of the lands abutting the

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1 The navigable waters are portions of the Quinault River and Lake Quinault. Most is within the exterior boundaries of the Quinault Reservation. The upstream portion of the Quinault River is outside the Reservation.

navigable waters are in non-Indian ownership?

2. Are treaty Indian fisheries on fish runs arising within a reservation subject to restrictions to assure other citizens an opportunity to participate in the fisheries?

3. Does the decision of this court in Washington v. Washington Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 61 L.Ed.2d 823, 99 S.Ct. 3055 (1979), to which the Quinault Tribe was a party, constitute res judicata in determining the Quinault Tribe's maximum share of the harvestable fish run?

LIST OF ALL PARTIES TO PROCEEDING.

The parties actively participating in the proceeding below were: Quinault

Indian Nation; State of Washington, Department of Game; and the United States of America.[2]

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2 Other parties to the proceeding in the district court as it exercises continuing jurisdiction were: Jamestown Klallam Tribe, Puyallup Tribe, Makah Tribe, Tulalip Tribe, Snoqualmie Tribe, Quileute Tribe, Hoh Tribe, Port Gamble Klallam Tribe, Jamestown Band Clallam Tribe, Lower Elwha Band Klallam Tribe, Muckleshoot Tribe, Nisqually Tribe, Nooksack Tribe, Port Gamble Band - Klallam Tribe, Suak-Suiattle Tribe, Skokomish Tribe, Squaxin Island Tribe, Stillaguamish Tribe, Suquamish Tribe, Swinomish Tribal Community, Upper Skagit Tribe, Yakima Tribe, Lummi Tribe, Swinomish Indian Tribal Community, and the Washington State Department of Fisheries.

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OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals, United States v. Washington is reported at 693 F.2d 188 (9th Cir. 1982) and appears in the appendix hereto (Appendix A). The Order Modifying and Approving Magistrate's Proposed Findings and Conclusions Re Allocation of Quinault River Steelhead entered by the United States District Court for the Western District of Washington on May 8, 1981 (Civil #9213-Phase I) is unreported (Appendix C). The District Court's Order denied reconsideration June 27, 1981, (Appendix D). The Report entered by the United States Magistrate on April 7, 1981 (Appendix B), was approved by the

District Court order of May 8, 1981.

JURISDICTION

The opinion of the Ninth Circuit Court of Appeals entered on December 7, 1982, affirmed the District Court's order and the United States Magistrate's report and recommendation. This petition is filed within 90 days of that date. The jurisdiction of this court is invoked under 28 USC 1254.

TREATIES INVOLVED

This case involves fishing rights under the Treaty with the Quinaielts (Treaty of Olympia), 12 Stat. 971. The relevant Article, Article III, reads as follows:

> The right of taking fish at all usual and accustomed grounds and stations is secured

> to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing the same; together with the privilege of hunting, gathering roots and berries, and pasturing their horses on all open and unclaimed lands. Provided, however, That they shall not take shell-fish from any beds staked or cultivated by citizens; and provided, also, that they shall alter all stallions not intended for breeding, and keep up and confine the stallions themselves.

STATEMENT OF THE CASE

The opinion here sought to be reviewed, affirmed orders issued by the United States District Court for the Western District of Washington in its continuing jurisdiction in United States v. Washington, (W.D. Wash, Civil No. 9213-Phase I). The continuing

jurisdiction involves Indian treaty fishing in the State of Washington.

The orders by the District Court denied a state motion which sought to terminate an Indian fishery on steelhead trout in the Quinault River. The basis for seeking the injunction was that the Quinault treaty Indian net fisheries on steelhead trout in the Quinault River had taken more than 50% of those fish and were continuing to fish despite repeated requests to terminate fishing.

The court also denied a Washington motion for reconsideration and request for determination that non-Indian fishermen are entitled to at least a 50% share of the Quinault River steelhead trout.

The treaty fishing rights issue and these parties have been before this Court in Washington v. Washington Commercial Passenger Fishing Vessel Ass'n., 443 U.S. 658, 61 L.Ed.2d 823, 99 S.Ct. 3055 (1979). After that decision the state took the position that the law was clear: requiring either treaty Indian or non-Indian fisheries to be closed to protect each other's share of the fishery. A maximum share of 50% was allocated to treaty Indians.

The State of Washington acted in good faith to implement the decision by closing nontreaty fisheries where necessary to comply, notice is given to the tribes if there is need for a fishing closure.

If a dispute arises as to the need for a closure, such disputes may be presented first to a "Fisheries Advisory Board" established by order of the court (United States v. Washington, 459 F.Supp. 1038, 1061 (1978)) and composed of representatives of the State and Indian tribes.

Some facts about the river and the fishery are necessary to understand this case.

The Quinault River arises in the Olympic mountains of Western Washington. It flows southwesterly and enters Lake Quinault and the boundaries of the Quinault Reservation.[3] Below Lake

3 As noted, infra, p. 18, most of the lands bordering the Lake are off-reservation.

Quinault, it re-forms into the Quinault River flowing southwest until it enters the Pacific Ocean.

There are runs of several salmon species (genus Onchorhynchus) present in the Quinault River. However, this case is concerned with steelhead, an anadromous rainbow trout (salmo garidnerii garidnerii). Like salmon, these trout migrate while young to the ocean where they spend several years maturing. There are several differences between salmon and steelhead.

Steelhead are not caught in saltwater (as are some salmon). Another difference between trout and salmon is that trout do not naturally die after spawning in freshwater.

When the Quinault steelhead return to the Quinault River, they are subject to treaty Indian net fisheries in the lower stretches of that river.

Nontreaty fisheries for steelhead trout are restricted by Washington State law to hook and line angling (RCW 77.16.060). They occur throughout the Quinault system, including the lower river, Lake Quinault and the portion of the river above the lake. (In the lower river, many of the fishermen are guided for a charge by Quinault tribal members.)

Though steelhead trout naturally spawn in most of the Quinault River, a large proportion of the catch is produced by a federal (or federally funded) hatchery within the Quinault Reservation.

Also important to this case is the ownership of the land bordering the Quinault River or Lake Quinault. Approximately 30% of all reservation land is non-Indian. The Tribe furnished the Circuit Court figures showing only 27.7% of the lands bordering Lake Quinault are on the reservation. Of this, less than half is tribally held (or in trust for Quinaults). Thus, a maximum 13% of the lake front is in trust. Of the downstream Quinault River 85.5% is tribally owned (or in trust for Quinaults) and 11.5% non-Indian. Of the tributaries, the relevant figure is 32% of the waterfront in non-Indian ownership.

In the first season after this

Court's decision in Washington v. Washington Commercial Passenger Fishing Vessel Ass'n, supra, the Quinault Tribe exceeded the treaty Indian 50% share of steelhead catch on the Quinault River by the end of January (1980). The Washington Department of Game took the matter to the Fisheries Advisory Board, trying to persuade the Tribe to stop fishing. After Washington filed a motion for injunction, the Tribe voluntarily closed its fishery.

The next steelhead season (1980-81) proceeded in a similar fashion. By January 8, 1981, the treaty Indian commercial catch had exceeded 50% of the total harvestable steelhead. The State Department of Game adopted a regulation

to close the commercial fisheries on the Quinault and several other rivers. The Quinault Tribe continued its refusal to go along with this closure. To enforce the Quinault closure, a motion for temporary restraining order / preliminary injunction was filed by Washington on January 10, 1981, with supporting affidavit, etc., and a notice of hearing.

Unlike the previous season, the Tribe did not act to close its fishery. An order of the district court referred the matter to a United States magistrate on January 9, 1981. After a hearing, the magistrate entered a report and recommendation for denial of the injunction on April 7, 1981, (after the treaty Indian fishery had taken most of

the run).

The magistrate reasoned that the Tribe was not limited to the 50% maximum established by this Court (Washington v. Washington Commercial Passenger Fishing Vessel Ass'n, supra) but rather had an exclusive right to 100% of "reservation" fish plus 50% of those which would pass upstream from the reservation. This conclusion was subsequently adopted by the district court. A motion for reconsideration / request for determination was denied. The appeal to the Ninth Circuit followed.

The Ninth Circuit affirmed the district court's orders, "under the compulsion of Consolidated Salish and Kootenai Tribes v. Namen, 665 F.2d 951

(9th Cir 1982), cert denied ___ U.S. ___ (Nov. 1, 1982)." United States v. Washington, 693 F.2d 188, at 189 (App. A).

FEDERAL COURT JURISDICTION

The district court exercises continuing jurisdiction. Jurisdiction was originally based upon one or more of the following statutes: 28 USC 1345, 1331, 1343 and 1362.

REASONS FOR GRANTING THE WRIT

The decision of the Ninth Circuit Court of Appeals conflicts with decisions of this Court in two ways. First, the decision conflicts with this Court's rulings that tribes do not have authority over non-Indian hunting and fishing, at least if it does not occur on Indian

land. Secondly, the decision conflicts with this Court's decision that non-Indians are also entitled to a share of fish runs to which the Treaty of Olympia applies.

1. The decision below conflicts with decisions of this Court limiting the authority of Indian tribes over non-Indians.

Decisions of this Court compel the conclusion that Indian tribes do not have jurisdiction to control non-Indian fishing and hunting activities, at least unless those activities occur on tribal lands. Montana v. United States, 450 U.S. 544, 67 L.Ed.2d 209, 101 S.Ct. 1245 (1981). Indeed, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 55 L.Ed.2d

209, 98 S.Ct. 1011 (1978), would seem to mandate that this conclusion--that tribes do not have jurisdiction over non-Indian hunting and fishing--may be without qualification as to ownership of the land. (There is, of course a federal statute prohibiting going on Indian lands for hunting and fishing without Indian permission. 18 USC 1165, discussed in Montana, supra, 561.)

The Circuit Court decision made no attempt to analyze these decisions, concluding that a tribe "owns" rivers within its reservation boundaries.

The court then implied that this "ownership" provides a tribe authority to exclude others (nonmembers) from all use of a navigable waterway, including

fishing. The Court cited as sole authority the Ninth Circuit decision in Consolidated Salish v. Namen, 665 F.2d 951 (9th Cir. 1982), cert. denied, ___ U.S. ___ (Nov.1, 1982).

The court below concluded that Indians own the bed and waters of all on-reservation waters, including those navigable, and thus own those resources such as fish found in those waters.

This reluctant conclusion led the circuit court to suggest this Court's review: "the possibility of conflict suggested by Justice Rehnquist warrants consideration of the issue by the Supreme Court." United States v. Washington, supra, at 190 (App. A).

Factually, this "ownership" analysis

is tenuous when applied to the steelhead trout in this case. These fish return to the river only after spending years in the ocean. Further some of these fish which originate within the reservation will, if not netted, migrate further upriver, beyond the reservation. Few have that opportunity, of course, being killed by the intensive lower river net fishery. This is also true of those which originate in the upper watershed.

The district court and the concurring circuit opinion are both willing to concede to non-Indian fishermen a share of the fish originating and returning to off-reservation upriver areas. Neither, however, suggests how such fish may be protected from the net

fishery when they enter mixed with fish to which they hold the Tribe has exclusive right. The rights the courts below concede are thus without remedy to protect them.

The "ownership" analysis, as previously applied in determining state interests in wildlife has been specifically overruled by this Court. Douglas v. Seacoast Products, 431 U.S. 295, 52 L.Ed.2d 304, 97 S.Ct. 1740 (1977):

> Neither the State nor the Federal Government, any more than a hopeful fisherman or hunter have title to these creatures until they are reduced to possession by skillful capture.

If this is true of the states (and the United States), it is also true of a

tribe. This Court has recognized that states have an interest not as owner, but as trustee for the public who participate in the use and enjoyment of the fish and wildlife. Though overruling the "ownership" fiction, the court has recognized the continued importance to a state's people of the state's power to preserve and regulate exploitation of a natural resource. Douglas, supra, at 284.

In this the state is a trustee for the beneficiaries; those who utilize and enjoy those resources. While a tribe may have an analogous trust interest in the fish resource while within its reservation, the regulatory authority extends only to the Tribe's members. The

trust responsibility should surely extend to protecting nonmember citizens' rights to the minimum 50% share to which this Court has held they are entitled. This will be more fully discussed infra, p. 32, et. seq.

It is ironic that the decision of the lower courts in this action are apparently predicated upon the authority of the tribe to totally exclude nonmember from sharing in the fish resource, but the tribe has not attempted to do so. Such fishing continues and tribal members benefit directly by serving as guides for substantial fees.

As in Montana v. United States, supra, an attempt to stop nonmembers' fishing would undoubtedly prompt vigorous

dissent from the nonmembers including the public who own the majority of the lake front, much of the river front, and the navigable river and navigable lake itself.

Even where the waterfront is held in trust for the Tribe, United States v. Winans, 198 U.S. 371, 49 L.Ed. 1089, 25 S.Ct. 662 (1905), suggests it is questionable whether such ownership could be used to exclude non-Indian fishermen from fish to which this Court has held them entitled by treaty. (See discussion, infra, p. 32.)

It is worthy of note also that the Quinault Reservation has never been an "exclusive" reservation for the Quinault Tribe such as was once true of some

Indian reservations. This Court set forth the history of the Quinault Reservation in some detail in Halbert v. United States, 283 U.S. 753, 75 L.Ed. 1389 (1931). Indians other than Quinaults were, and are owners of the reservation lands. If nonmembers, these Indians presumably could also be victim of any determination the Quinault tribal rights are exclusive.

As previously noted, there is substantial non-Indian ownership of waterfront. Once nonmembers are assured of obtaining access to these navigable waters, the questions are two. First, can they fish? Second, is the fishery to be meaningful, i.e., will any fish be available?

The affirmative answers to both of those questions are found in a previous decision of this Court which the court(s) below disregarded.

2. The decision that the Tribe may catch all the reservation fish run conflicts with this Court's decisions interpreting the treaty fishing article.

This court, in Puyallup Tribe v. Department of Game (Puyallup I), 391 U.S. 392, 20 L.Ed.2d 689, 88 S.Ct. 1725 (1968), and Puyallup Tribe v. Washington Game Department (Puyallup III,) 433 U.S. 165, 53 L.Ed.2d 667, 97 S.Ct. 2616 (1977), held that the rights of the treaty Indians and all citizen fishermen should both be protected are entitled to a fair share and that neither could act

to preempt the other. The existence of a reservation was not legally relevant to that holding. ("The continued existence of the Puyallup Reservation has been a matter of dispute on which we express no opinion." Puyallup III, supra, at fn. 11, p. 174.)

Finally (Washington hoped) this Court in Washington v. Washington Commercial Passenger Vessel Ass'n.†, supra, specified the limits to apply in determining the share of each. The Indians' entitlement is a maximum of 50% of any run. Other fishermen are entitled to catch the other 50% and to have that opportunity protected:

> Counting the reservation catch then, the treaty Indian catch is subject to a maximum of 50%

...

> It bears repeating, however, that the 50% figure imposes a maximum but not a minimum ... the maximum possible allocation to the Indians is fixed at 50%, the minimum is not; ...

Washington v. Washington Commercial Passenger Fishing Vessel Ass'n., supra, at 686, emphasis supplied.

In reaching this conclusion, the court considered the Quinault Treaty (Treaty of Olympia, 12 Stat. 971) and determined that it secured to both sides a right to take a fair share of the available fish. The prior Puyallup decisions were discussed in light of the Indians' argument that they had an exclusive right to the on-reservation fish. This is particularly important

because this Court had considered the existence or non-existence of a reservation irrelevant in prior decisions to protect the fish and fishing rights of treaty Indians and those of other citizens.

The conclusion mandated by these decisions is that an exclusive right to the fish does not exist, irregardless of the existence of a reservation.

This determination is res judicata and binding on the Quinault Tribe. The Tribe was involved in both cases. The Tribe was a party in Washington v. Washington Commercial Passenger Fishing Vessel Ass'n.. They were also represented, through the United States Government which argued on behalf of all

tribes (in that case, as it did in this case). The Quinaults were also one of the amici curiae and represented by the United States in its trust capacity in the Puyallup decisions.

The Quinaults joined in the brief of respondent tribes, in Washington v. Washington Commercial Passenger Fishing Vessel Ass'n, supra, assured this Court that the on-reservation catch was factually not a problem since the sharing was negotiated and agreement reached with the state:

> [T]o prevent any of the type of on-reservation preemption about which this court expressed concern in the Puyallup litigation fn 296
>
> fn 296
> In addition, the district court specifically ruled that

> neither the State nor the tribes may authorize fishing which would preempt the opportunity of the other.

Tribal Brief, p. 105.

Additionally, the Quinault Tribe, in its separate brief, acknowledged the on-reservation application of the sharing of fish. The Quinault brief showed the steelhead run as precisely equally divided between "river net" and steelhead sports. (Quinault Appendix, D-1).

The necessary conclusion is that the Quinault Tribe, acting on its own behalf, (joining one brief, filing one separately) and represented by its trustee the United States had full opportunity to raise, or chose not to raise, all arguments for excluding

Quinault steelhead caught on-reservation. They are bound by the judgments in both Puyallup and Washington v. Washington Commercial Passenger Fishing Vessel Ass'n.

This Court's judgment is clear: On-reservation catch is all to be counted; there must be no preemption of the non-Indian fishery, even where an exclusive right of access could be argued (on the Quinault as in Puyallup such is not the case, see supra, p. 29-31):

> Both sides have a right, secured by treaty, to take a fair share of the available fish. That, we think, is what the parties to the treaties intended when they secured to the Indians the right of taking fish in common with other citizens.

Washington v. Washington Commercial

Passenger Fishing Vessel Ass'n, supra, at 684.

As noted above, the "fair share" was determined by this Court to be (at least) 50% for the nontreaty fisheries. That right, secured by treaty, must be as enforceable as the right of the treaty Indians. Washington asks the assistance of this Court in rendering it so.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

DATED this 4th day of March, 1983.

Respectfully submitted:

KENNETH O. EIKENBERRY
Attorney General

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Sr. Asst. Attorney General

UNITED STATES of America,
et al., Appellees,

v.

STATE OF WASHINGTON,
et al., Appellants.

No. 81-3502

United States Court of Appeals
Ninth Circuit

Argued and Submitted July 8, 19
82

Decided Dec. 7, 1982

Appeal was taken from judgment of the United States District Court for the Western District of Washington, Walter Early Craig, J., in an action involving dispute over Indian fishing rights. The Court of Appeals, Kilkenny, J., held

that Indians who were party to treaty owned lake bed under that part of a lake which was specifically included in and formed a boundary of the reservation, where the Indians were dependent upon fishing when the treaty was signed.

Affirmed.

Canby, Circuit Judge, filed a concurring opinion.

Indians

Indians who were party to a treaty owned the lake bed under that part of a lake which

was specifically included in and formed a boundary of the reservation, where the Indians were dependent upon fishing when the treaty was signed.

Appeal from the United States District Court, Western District of Washington.

Before WRIGHT, KILKENNY and CANBY, Circuit Judges.

KILKENNY, Circuit Judge

This action came before the district court pursuant to

its continuing jurisdiction over certain disputes involving Western Washington Indian Tribes and the State of Washington. See, United States v. Washington, 384 F.Supp. 312, 419 (W.D. Wash. 1974), aff'd 520 F.2d 676 (CA 9 1975), cert. denied, 423 U.S. 1086, 96 S.Ct. 877, 47 L.Ed.2d 97 (1976). This particular controversy arose on January 8, 1981, when the State of Washington asked the district court to issue either a temporary restraining order or preliminary injunction to prevent the Quinault Indian

Nation from taking any further steelhead trout from the 1980-81 Quinault River Steelhead Run. The district court denied the request. In addition, the district court determined the respective rights of the parties to the Quinault River Steelhead Run. This appeal followed.

Under the complusion of Consolidated Salish & Kootenai Tribes, etc. v. Namen, 665 F.2d 951 (CA9 1982), cert. denied, ___U.S. ___, 103 S.Ct. 314, 74 L.Ed.2d___(1982) (Justices Rehnquist and White

dissenting), we affirm the decision of the district court.

Confederated Salish held that Indians party to a treaty owned the lake bed under that part of a lake specifically included in and forming a boundary of the reservation, when the Indians were dependent on fishing when the treaty was signed. This case presents the same situation.

Justice Rehnquist has suggested that Montana v. United States, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493

(1981), requires that a treaty specifically grant rights in land under navigable water, or that land will be treated as held by the United States for the benefit of the future state. Confederated Salish, ___ U.S. ___ at ___, 103 S.Ct. 314 at 315 (1982). (Rehnquist, J., dissenting), denying cert. to 665 F.2d 951 (CA9 1982). He expressed "substantial doubt as to whether the Court of Appeals reached the right conclusion" on the land ownership issue in Confederated Salish. Id. at ___, 103 S.Ct. at 315.

There are factual differences between Montana and Confederated Salish. However, as Justice Rehnquist points out, the exact limits of the Montana holding are not clear. Given the importance of certainty where issues of ownership of land are involved, the possibility of conflict suggested by Justice Rehnquist warrants consideration of the issue by the Supreme Court.

AFFIRMED.

CANBY, Circuit Judge,

concurring:

I concur in Judge Kilkenny's opinion, except that I do not share the expressed doubt as to the proper limits of the Montana and Confederated Salish holdings. In my view the two decisions are distinguishable for reasons stated in Confederated Salish, 665 F.2d at 961-62, and, as the majority here concludes, the present case falls squarely within the rule of Confederated Salish.

I also wish to add a few

words of explanation about the controversy before us. The dispute in this case arises from the fact that a large portion of the steelhead run in the Quinault River never proceeds far enough upstream to leave the boundaries of the Quinault Indian Reservation, which encompass the River from its mouth into Lake Quinault, 21 miles inland. A minor part of the run, however, migrates upstream beyond Lake Quinault and the Reservation. The district court ruled that non-treaty fishermen (i.e., the general public) were entitled

only to 50% of the harvestable run of those steelhead that would, if not intercepted, pass upstream beyond the boundaries of the Reservation. The State contends that the district court should have allocated to non-treaty fishermen 50% of the harvestable portion of the entire run, including those fish that never pass beyond the boundaries of the Reservation. Our decision affirms the order of the district court.

It is already established in this case that the tribe retains exclusive fishing

rights within the boundaries of its Reservation. United States v. Washington, 384 F.Supp. 312, 332 and n. 12 (W.D. Wash. 1974) ("Final Decision I"), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086, 96 S.Ct. 877, 47 L.Ed.2d 97 (1976). It is true that the tribe may not rely on that exclusive right in order to take more than its equal share of fish passing through the reservation. Washington v. Washington State Commercial Passenger Fishing Vessel Assn'n, 443 U.S. 658, 683-84, 99 S.Ct. 3055, 3073-3074, 61

L.Ed.2d 823 (1979). On the other hand, it is inherent in the tribe's exclusive control of its reservation that non-treaty fishermen would be entitled to no part of the run if none of the fish ever passed beyond the reservation (or, indeed, if the river did not). If some few fish pass beyond the reservation, then the non-treaty fishermen are certainly entitled to harvest their share of those fish. The passage of those few fish, however, does not entitle non-treaty fishermen to half of all of the harvestable fish in

the river. Nor does the principle change if more than a few passed; the non-treaty share must still be derived from that run of fish to which non-treaty fishermen are entitled to access. The district court's formula is therefore a proper one.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, et al.,	)	
Plaintiffs,	)	Civil No. 9213 - Phase I
v.	)	
STATE OF WASHINGTON, et al.,	)	REPORT AND RECOMMENDATION ON MOTION FOR TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION
Defendants.	)	

SUMMARY

The Court has referred, for report and recommendation, a motion by the State of Washington for a temporary restraining order or preliminary injunction. The stakes involved are the competing interests of treaty and non-treaty fishermen in steelhead trout which enter

the Quinault River from the Pacific Ocean. For reasons discussed below, I recommend the Court conclude that non-treaty fishermen are entitled to a much smaller share of the steelhead than the State of Washington claims on their behalf. The State's motion for injunctive relief should therefore be denied, and the problem of allocation remanded to the Fisheries Advisory Board with specific directions.

PROCEDURAL BACKGROUND OF MOTION

This is the second such motion presented by the State. About one year ago, it filed a Motion for a Temporary Restraining Order or Preliminary Injunction, seeking to limit fishing by the Quinault Nation ("Tribe") and its

members in the Quinault River. The United States, on behalf of the Tribe, filed a memorandum in opposition. Apparently the State never pursued the motion, and there was never a ruling on it.

The State filed this motion on or about January 8, 1981, relating to the 1981 Quinault steelhead run. This was referred for hearing to United States Magistrate Robert E. Cooper, but later transferred to the undersigned by order filed January 16, 1981. Counsel for all parties and intervenors filed memoranda and affidavits, and participated in a hearing on January 21, 1981.[1] By

1 A transcript of that hearing has been filed as docket #7436.

agreement, that hearing was limited to oral argument; no evidence was presented, beyond that contained in the affidavits.

At the conclusion of the hearing, counsel were advised of the substance of this Report and Recommendation, and that they would receive copies and be afforded an opportunity to respond to it before final ruling by the Court. 28 U.S.C. §636(b)(1).

FACTUAL SETTING

Although there has been no evidentiary hearing on the motion, certain facts are set forth in the affidavits. Others, stated by counsel in their memoranda or in oral argument, are essentially undisputed. There appears to

be no genuine dispute as to the basic facts relating to the motion. The real dispute turns upon the proper application of the case law to this factual setting.

1. Geography. The Quinault Reservation comprises about 190,000 acres or almost 300 sq. miles. It is shaped roughly in the form of triangle, with one edge consisting of about 24 miles of Pacific coastline. The reservation tapers to Lake Quinault about 21 miles inland, which is contained within the reservation and represents its easternmost portion. The mouth of the Quinault River is on the reservation, as is the entire portion of the river between the Pacific Coast and Lake Quinault. The river originates upstream

of Lake Quinault, however, in lands entirely outside of the reservation.

2. Steelhead Run. Returning steelhead enter the mouth of the Quinault and head upstream every year, between about mid-November and the end of April. Like salmon, steelhead generally return to their spawning grounds. They are not quite as dependable as salmon in this respect, however, and there is somewhat more "straying." Two hatcheries and a penned rearing facility on the reservation release a substantial number of steelhead. There are also wild steelhead, some which originate in and below Lake Quinault (i.e. on the reservation), and others above the lake (off the reservation).

As a result, if no returning steelhead at all were taken from any portion of the Quinault River system, some would never leave the reservation, where their spawning grounds are located. These steelhead will be designated "reservation fish."[2] Others, however, would migrate up the river, through Lake Quinault, and then further upstream to areas off the reservation. These steelhead will be designated "through fish."

The Tribe and the United States estimate that, in 1980-1981, 85% of the fish entering the Quinault River are "reservation fish." While the State

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2 In their briefs and argument, counsel referred to these steelhead as "destination fish."

disputes the precise accuracy of this number, there seems to be little dispute that, even if there were no fishing, only a small minority of the steelhead entering the Quinault River would ever pass through Lake Quinault and leave the reservation. The parties advise that the Fisheries Advisory Board can, if directed, make a reliable determination for a given year of the proportions of "reservation" and "through" fish.

3. Fishing. Based upon run predictions and various biological factors, a total harvestable number of steelhead can be set each year for the entire Quinault River run. The 1980-1981, that number will be approximately 15,000 fish. The parties

agree that, for conservation reasons, the total harvest must in no event exceed that amount and, if possible, should not be substantially less.

The Tribe and its members have the exclusive right to take steelhead on the reservation, subject to two minor exceptions discussed below. They do so, pursuant to Tribal fishing regulations, by net fishing, which is relatively efficient. Non-treaty fishermen take steelhead by "sport fishing" techniques - i.e., by hook and line. Even in a good year, this technique is not particularly "efficient," compared to net fishing. This year, weather conditions have caused so much turbidity of the river that the fish cannot see the lures. The harvest

by sport fishermen is therefore of de minimus proportions.

While non-treaty fishermen on the Quinault River do most of their steelhead fishing above Lake Quinault, off the reservation, some hire Indian guides, and are therefore permitted to fish on the reservation. Others own fee patent land on the river within the reservation, and fish there for steelhead.

As of January 19, 1981, the Quinault Tribal catch on the Quinault River from November 1, 1980 was 9,462 steelhead.[3] This represents approximately 63% of the projected maximum 1980-1981 harvest for all fishermen for all portions of the

3 Affidavit of Peter K. J. Hahn, January 19, 1981.

river.

CONTENTIONS OF THE PARTIES

Reduced to simplest terms, the contentions of the parties are as follows.

The State asserts that treaty and non-treaty fishermen are each entitled to half of the harvestable steelhead that enter the Quinault River system, regardless where the fish are destined or are taken.

The United States, together with the Tribe and other intervenor tribes, claim that treaty fishermen are entitled to the sum of: (a) 100% of the harvestable steelhead that are "reservation fish;" and (b) 50% of the harvestable steelhead that are "through fish." They contend

that the non-treaty fishermen are entitled only to the other 50% of the "through fish."

While the issue is now essentially moot for the 1980-1981 steelhead run, all parties agree that the legal issue of the share to which each group is entitled is an important one for allocations of runs in future years.

LEGAL PRINCIPLES ESTABLISHED IN PRIOR CASES

From the welter of decisions on the fishing rights of the treaty Indians in the State of Washington, several relevant basis principles emerge.

1. Apportionment. The Stevens Treaties require apportionment, between treaty Indians and non-treaty fishermen,

of the harvestable portion of each run that passes through a "usual and accustomed" fishing ground for treaty Indians. Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658, 685 (1979) ("Passenger Fishing Vessel").

2. Size of Shares. As to those runs that are subject to allocation at all, the maximum share of the treaty Indians is 50% of the harvestable portion of the run which passes through its customary fishing grounds. The treaty Indians are entitled only to a smaller portion, if such a portion is sufficient to provide the treaty Indians a moderate living. Passenger Fishing Vessel, 443 U.S. at 686-687. The burden is on the

State to show that some share less than 50% would be sufficient to provide the Indians a moderate living. "Opinion" of Hon. William H. Orrick filed in this case, 9-26-80, docket no. 7240, at page 31.

3. No Share If No Access. The allocation rules apply only to those runs of fish which, in the course of their migration, are subject to harvest both by treaty and non-treaty fishermen. In other words, treaty fishermen have no right to any portion of a run which at no point enters or passes through a usual and accustomed fishing ground.

4. Fish Counting Rules. Once a fish run has been identified as subject to allocation between treaty and

non-treaty fishermen, the courts have developed a number of rules governing how fish catches are counted and applied against those allocations. Those rules include the following:

> (a) On a run that passes through a reservation, then goes upstream to an area where nontreaty fishermen have access, fish caught by treaty fishermen on the reservation count toward the overall share of treaty fisheremen. Passenger Fishing Vessel, 443 U.S. at 687.
>
> (b) Hatchery-bred fish are to be treated in the same manner as "natural" or "wild" fish, for purposes of allocations and counting against shares. See "Judgment" entered by the Hon. William H. Orrick in Phase II of this case, filed on January 8, 1981, docket no. 7374, together with Judge Orrick's "Opinion" filed September 26, 1980, docket no. 7240).

5. Interference With Upstream Catch. Where a fish run passes through an area in which either treaty or non-treaty fishermen have exclusive access, that group cannot take so many fish as to impair the rights of upstream fishermen to take their fair share. Puyallup Tribe v. Washington Department of Game, 433 U.S. 165 (1977) ("Puyallup III"); and U.S. v. Winans, 198 U.S. 371.

6. Proper Harvest to Be Assured. Allocations of fish should never be done in a manner which would result either in over-harvest or under-harvest. If a group of fishermen - be it the treaty fishermen or non-treaty fishermen - is not in a position to catch all of the

fish to which it would otherwise be entitled, the remainder should be re-allocated to the other group.

APPLICATION TO THIS CASE

If all of the steelhead which enter the mouth of the Quinault River swam upstream only to points within the reservation (i.e., all were "reservation fish"), this case would pose no problem. The treaty Indians would be entitled to all of the harvestable steelhead.

Likewise, if all of the steelhead swam through the reservation and into the portion of the Quinault River above Lake Quinault (i.e., all were "through fish"), there would likewise be little problem. The case would therefore be identical in most respects to Puyallup III. The

treaty and non-treaty fishermen would each be entitled to 50% of the harvestable run. Fish caught by the Indians on the reservation would count toward their allocation, by virtue of Passenger Fishing Vessel. Hatchery fish would likewise count, by virture of Judge Orrick's decision. If non-treaty fishermen were able to show that the treaty Indians had taken, or were threatening to take on the reservation, more than their 50% share of the entire run, the non-treaty fishermen would be entitled to relief from this Court, as they were in Puyallup III.

Passenger Fishing Vessel and Puyallup III both involved "through fish." In this case, by contrast, only

one-seventh of the steelhead are "through fish." The other six-sevenths are "reservation fish", which never reach a joint use area.

Allocating 50% of all of the steelhead entering the Quinault River respectively to treaty and non-treaty fishermen would work manifestly unfair results. The vast majority of the fish are "reservation fish." Why should the fact that a few of them would swim beyond the reservation and therefore become accessible to non-treaty fishermen, entitle non-treaty fishermen to 50% of the entire number of fish entering the Quinault River? Indeed, even if allocated a 50% share, non-treaty fishermen could not begin to harvest

these fish. Even if they were the only fishermen in the stream above Lake Quinault (and they are not), and even if they could catch every steelhead which swam above Lake Quinault (and they have difficulty catching any this year), the most they could take would be one-seventh of total number of fish entering the Quinault River. Furthermore, this does not allow for escapement of any of the fish that swim above Lake Quinault. The allocation of 50% of all of the steelhead to the non-treaty fishermen therefore could not possibly be justified.

By the same token, however, the treaty fishermen cannot be permitted to harvest steelhead at will, and without limitation, on the reservation. The

portion of the river above Lake Quinault is a joint use area. Although the number of steelhead which would reach that area is relatively small, nevertheless the non-treaty fishermen are entitled to at least their share of the harvestable portion of those fish. The United States conceded as much in its memoranda before this court. If the treaty fishermen are permitted to harvest as many fish as they see fit on the reservation, a possible result is that no harvestable fish would be available to the non-treaty fishermen above the lake.

It is therefore my recommendation that the court regard the steelhead which enter the Quinault River as comprising two separate runs: those which have been

designated "reservation fish" herein, and those which have been designated "through fish." The court should find that treaty fishermen are entitled to take the entire harvestable number of "reservation fish." The two groups are each entitled to 50%, however, of the "through fish."

Steelhead taken by treaty fishermen would count toward their allocation, whether taken within or outside the reservation. Passenger Fishing Vessel. Hatchery bred fish would count toward their allocation in the same manner as other fish. ("Judgment" of Judge Orrick).

Likewise, steelhead caught by non-treaty fishermen would count toward their allocation, whether taken above

Lake Quinault or within the reservation (e.g., as part of the Indian guide fishery, or by owners of land within the reservation).

Counsel advised that, when a fish is taken on the reservation, it is not possible to identify whether it is a "reservation fish" or a "through fish." This will not be necessary, however, in giving effect to the foregoing allocation. As discussed above, it apparently is possible to predict the total number of steelhead which will enter the Quinault River in a given year, the proportions of those fish which are "reservation fish" and "through fish," and the appropriate level for harvest. Using the legal conclusions recommended

above, the Fisheries Advisory Board can then use this data to determine the share for each group for a given year. Steelhead can then be credited against those shares, wherever harvested.

It is respectfully submitted that the foregoing procedure would be fair to both groups, and fully consistent with prior court determinations in this area.

In addition, the foregoing would parallel one which has already been made for the Lower Columbia River. The United States and the Tribe assert that the Lower Columbia presents a highly analogous situation, with the positions of the parties reversed. They assert that non-treaty fishermen have exclusive fishing access to the Lower Columbia

River. There are adjudicated treaty fishery rights, however, on the Columbia above Bonneville Dam. Some, but not all, of the fish available in the Lower Columbia River are destined for the area above Bonneville Dam. According to these parties, the State has contended, and the federal courts have agreed, that the non-treaty fishermen are entitled to harvest all of those fish in the Lower Columbia which are not destined to travel above Bonneville Dam. The treaty fishermen are entitled, however, to a 50% share of those fish headed to or through the joint use areas. Thus, they contend, the courts have already applied a "combined run" principle in another situation where fish enter an exclusive

access area, and only some of the fish continue to a joint use area.

If the court accepts the conclusions recommended above, the motion for injunctive relief must be denied. The State has shown that the treaty fishermen have taken more than 50% of all the harvestable steelhead. But it has not shown that the treaty fishermen have taken so many as to impinge upon the proper share of the non-treaty fishermen: 50% of the "through fish." The State has also failed to show that the non-treaty fishermen would be in a position to take appreciably more steelhead if the Indian fishery were enjoined. The court's strong policy of assuring a full harvest would require such a showing before

injunctive relief could be granted.

CONCLUSION

For the foregoing reasons, I recommend the court make the following determinations:

(1) The Motion For a Temporary Restraining Order or Preliminary Injunction should be DENIED.

(2) Of the steelhead trout which enter the Quinault River in any given year, non-treaty fishermen are entitled to a 50% share of the harvestable portion of those fish which can be expected to migrate above Lake Quinault. Treaty fishermen are entitled to the

balance of the harvestable portion of steelhead which enter the Quinault River.

(3) All steelhead taken by fishermen should count toward their allocation, whether taken on or off the reservation.

(4) Hatchery bred fish should be treated in the same manner as natural or wild fish.

(5) The Fisheries Advisory Board, applying the foregoing principles and utilizing information as to run sizes and distribution, and other available data, should endeavor to determine the respective shares for treaty and

non-treaty fishermen of steelhead trout entering the Quinault River.

DATED this 7 day of April, 1981.

/s/_____
John L. Weinberg
United States Magistrate

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, et al.,	)
Plaintiffs,	) CIVIL NO. 9213--Phase I
v.	)
STATE OF WASHINGTON, et al.,	) ORDER MODIFYING AND APPROVING MAGISTRATE'S PROPOSED FINDINGS AND CONCLUSIONS RE ALLOCATION OF QUINAULT RIVER STEELHEAD
Defendant .	)

The Court, having reviewed the

Report and Recommendations of the Magistrate in this matter issued April 7, 1981, conducted a scheduled hearing on April 21, 1981, to consider any objections or views of the parties concerning said report, and having considered all such objections, views, and supporting arguments submitted by the parties at or prior to such hearing, together with the pleadings and the record before the Magistrate, now hereby makes the following de novo determination of the matter.

It is HEREBY ORDERED, ADJUDGED AND DECREED as follows:

A. The Report and Recommendation of Magistrate John L. Weinberg dated April 7, 1981, are hereby approved and adopted

with the modifications stated below.

B. The Magistrate's determinations of fact (designated as "Factual Setting") are modified by deleting the last sentence of the next to the last paragraph thereof (lines 8-10 of p. 5 of the Report).

C. The Conclusions recommended by the Magistrate are modified and hereby adopted as follows:

1. Defendant's Motion for a Temporary Restraining Order or Preliminary Injunction is DENIED.

2. Of the steelhead trout which enter the Quinault River in any given annual run, nontreaty fishermen are entitled to a 50% share of the harvestable portion of those fish which,

if not subjected to prior interception, would be expected to migrate above Lake Quinault. Treaty fishermen are entitled to the balance of the harvestable portion of steelhead which enter the Quinault River.

3. All steelhead taken by fishermen count toward their allocation, whether taken on or off the reservation.

4. Hatchery-bred fish shall be treated in the same manner as natural or wild fish.

5. The Fisheries Advisory Board, applying the foregoing principles and utilizing information as to run sizes and distribution, and other available data, should endeavor to determine escapement goals and the respective shares for

treaty and nontreaty fishermen of steelhead trout entering the Quinault River.

Dated this 8th day of May 1981.

/s/ Walter E. Craig
Sr. United States
District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

UNITED STATES OF AMERICA, et al.,	)	
Plaintiff ,	)	CIVIL NO. 9213--Phase I
v.	)	
	)	ORDER
STATE OF WASHINGTON et al.	)	
Defendant.	)	

The State of Washington has filed a motion to reconsider the Court's order modifying and approving the magistrate's proposed findings and conclusions re allocation of Quinault River steelhead. The motion is denied for the reason that there is nothing in the motion that was not fully considered when the Court made

its original decision.

IT IS SO ORDERED.

DATED at Prescott, Arizona this 2nd day of June, 1981.

/s/_____
Walter E. Craig
United States District Judge

No. 82-1507

In the Supreme Court of the United States

OCTOBER TERM, 1982

WASHINGTON STATE DEPARTMENT OF GAME, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether Indians who have exclusive fishing rights within the Quinault Reservation are entitled to take all harvestable steelhead trout that are destined to terminate their run within the confines of the Reservation.

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In the Supreme Court of the United States

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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is reported at 694 F.2d 188. The district court's order modifying and approving the magistrate's proposed findings and conclusions (Pet. App. C1-C5) and the magistrate's report and recommendations (Pet. App. B1-B29) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 1982. The petition for a writ of certiorari was filed on March 7, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

TREATY PROVISIONS INVOLVED

Article III of the Treaty of Olympia, July 1, 1955, United States-Quinaielts, 12 Stat. 972, is set out at Pet. 11-12. Article II of the Treaty, 12 Stat. 971, provides in pertinent part as follows:

> There shall * * * be reserved, for the use and occupation of the tribes and bands aforesaid, a tract or tracts of land sufficient for their wants within the Territory of Washington, * * * and set apart for their exclusive use, and no white man shall be permitted to reside thereon without permission of the tribe and of the superintendent of Indian affairs or Indian agent. * * *

STATEMENT

The State of Washington brings to this Court yet another chapter in the fishing rights controversy between treaty Indians and non-Indians.[1] This action involves the annual run of steelhead trout from the Pacific Ocean up the Quinault River to their spawning grounds (Pet. App. B6).[2] The mouth of the river is located on the Quinault Reservation, as is that part of the river between the mouth and Lake Quinault, and Lake Quinault itself (*id.* at B5). The river originates upstream of the lake, and that part of the river between its source and the lake is off the reservation (*id.* at B5-B6). A map of the river system and the Quinault Reservation is reproduced as Appendix B to the Brief in Opposition filed by the Quinault Indian Nation.

Steelhead trout, like salmon, generally return to their spawning grounds, either in the lower reaches of the river, on the reservation, or in the river's upper reaches beyond Lake Quinault and off the reservation (Pet. App. B6). Those steelhead that end their run on the reservation are

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[1]See *United States* v. *Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976); 459 F.Supp. 1020, aff'd, 573 F.2d 1123 (1978), substantially aff'd *sub nom. Washington* v. *Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979), remanded to district court for continuing jurisdiction, Nos. 77-3129, *et al.* (9th Cir. Sept. 14, 1979).

[2]The run extends from approximately mid-November to the end of April (Pet. App. B6).

referred to as "reservation fish," and those that continue upstream beyond the reservation are called "through fish" (*id.* at B7).

In January 1981, petitioner sought a temporary restraining order or preliminary injunction to prevent the Quinault Tribe and its members from fishing the Quinault River. Petitioner maintained that, under *Washington* v. *Washington State Commercial Passenger Fishing Vessel Association (Fishing Vessel)*, 443 U.S. 658 (1979), the Quinaults were limited to a maximum of 50% of the steelhead in any annual run, that "reservation fish" as well as "through fish" counted against the tribe's share, and that the Quinaults were in the process of catching steelhead in excess of this allocation during the 1980-1981 steelhead run. The motion was referred to a magistrate, who recommended denying injunctive relief (Pet. App. B27). The magistrate concluded that petitioner had not demonstrated that the Quinaults were exceeding their allocation of steelhead. He determined that of the steelhead entering the Quinault River during any annual run, nontreaty (*i.e.*, non-Indian) fishermen are entitled to up to 50% of the harvestable portion of the "through fish," and treaty (*i.e.*, Quinault Reservation Indian) fishermen are entitled to take all harvestable "reservation fish" as well as a maximum of 50% of the harvestable "through fish" (*id.* at B27-B28). The district court adopted the magistrate's report and recommendations with minor modifications not material to the allocation issue (*id.* at C1-C5), and the court of appeals affirmed (*id.* at A1-A14).

ARGUMENT

The decision below correctly applies this Court's prior rulings on the issue in question and does not conflict with any other decision of this Court or of any other court of appeals. Accordingly, further review by this Court is unwarranted.

1. Once again, the Washington State Game Department is seeking to deprive treaty Indians of their fishing rights. To that end, petitioner selectively quotes passages from this Court's decisions for the wholly unsupportable proposition that the Indians have somehow lost their exclusive on-reservation fishing rights. The contention is that the equal sharing formula established in the district court in 1974 and confirmed by this Court in *Fishing Vessel, supra,* 443 U.S. at 685-686 & n.27, means that non-Indians are now entitled to catch 50% of "reservation fish" — that is, fish that can be caught only on the Quinault Reservation where non-Indians have no right to fish. Petitioner disregards the fact that even if there were no Quinault Reservation fishery at all, these "reservation fish" would never arrive at the fishing areas in which Indians and non-Indians have the right to fish "in common with" each other (see Pet. App. B7, B18-B20). No court has ever held, nor has this Court suggested, that the equal sharing formula applies to such fish.

This Court has consistently recognized that Article II of the Indians' treaties secured exclusive on-reservation fishing rights. *Fishing Vessel, supra,* 443 U.S. at 683-684, 687; see also *id.* at 698 (Powell, J., dissenting).[3] The only relevant limitation on the tribes' exclusive on-reservation fishing rights that the Court has recognized is that those rights may not be exercised in such a manner as to deprive non-Indians of an opportunity to fish in common with the Indians *off* the reservation. In other words, this Court has limited the Indians' on-reservation fishing rights only with respect to

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[3]Accord *United States* v. *Washington, supra,* 384 F.Supp. at 332, 341; *Puget Sound Gillnetters Ass'n.* v. *District Court,* 573 F.2d 1123, 1126 (9th Cir. 1978); *United States* v. *Washington, supra,* 520 F.2d at 676; *Moore* v. *United States,* 157 F.2d 760, 761, 763-764 (9th Cir. 1946), cert. denied, 330 U.S. 827 (1947); *Mason* v. *Sams,* 5 F.2d 255, 258 (W.D. Wash. 1925); *Pioneer Packing Co.* v. *Winslow,* 159 Wash. 655, 662, 294 P. 557, 559 (1930).

"through fish." The *Puyallup* series of cases,[4] upon which petitioner heavily relies (Pet. 32-38), concerned only "through fish." In *Puyallup III*, the Court rejected the Puyallups' claim to an unrestricted right "to take steelhead *while passing through* [the] reservation" (433 U.S. 165, 177 (1977); emphasis added; see *id.* at 173-177). In *Fishing Vessel*, the Court explained that in *Puyallup III* it had "rejected the Tribe's claim to an untrammeled right to take as many of the steelhead running *through* the reservation as it chose" (443 U.S. at 684; emphasis added), so as to deprive non-treaty fishermen of their right to an equal share of the "through fish." And it is readily apparent that *Fishing Vessel* itself applied the equal sharing formula only to "through fish" (see 443 U.S. at 683-687).[5]

But we are not here concerned with "through fish" because petitioner does not contend (nor could it on this factual record) that the Quinaults are taking more than their 50% share of the "through" steelhead.[6] What

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[4] *Puyallup Tribe* v. *Washington Dep't of Game*, 391 U.S. 392 (1968) (*Puyallup I*); *Washington Dep't of Game* v. *Puyallup Tribe*, 414 U.S. 44 (1973) (*Puyallup II*); *Puyallup Tribe* v. *Washington Dep't of Game*, 433 U.S. 165 (1977) (*Puyallup III*).

[5] *Fishing Vessel, supra*, 443 U.S. at 686 n.27, approved the equal sharing standard as a logical implementation of the Indians' right to take fish "in common" with non-Indians "at all usual and accustomed grounds and stations," a right secured by Article III of the treaties. The Indians' Article III rights pertain to off-reservation fishing and stand apart from their exclusive fishing rights on the reservation under Article II. It is thus clear that *Fishing Vessel* did not apply the equal sharing formula to the Indians' exclusive right to take "reservation fish."

[6] The record establishes that approximately 85% of the disputed run consists of "reservation fish" that would never migrate off the reservation even if the Quinaults ceased fishing, and that only 15% of the run is destined for spawning grounds on that stretch of the river that is above Lake Quinault and off the reservation (Pet. App. B18-B19). Petitioner does not contend that the Quinaults have taken so many steelhead on the reservation that non-Indians have no opportunity to catch the 7½% of the total run to which they are entitled.

petitioner seeks instead is an injunction that would prohibit the Quinaults from catching fish that will never arrive at joint (*i.e.*, "in common") fishing areas. Not only does the State (and its non-Indian fishermen) lack any legal basis for a claim to those fish, but the injunction it seeks would run counter to the management principle that it is as important to avoid under-harvesting the resource as it is to avoid over-harvesting (see Pet. App. B26-B27).

In sum, the decision below respects the exclusive on-reservation fishing rights of the Quinaults by permitting them to capture those fish that would never migrate off the reservation, and at the same time gives due effect to the provisions of Article III as to those fish that continue beyond the reservation and into the "in common" fishing areas with which that Article is concerned.[7]

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[7]As the magistrate noted (Pet. App. B24-B26), the result in this case is consistent with the disposition of fishing rights on the Columbia River. There, the situation is reversed, with non-treaty fishermen having exclusive access to fishing on the Lower Columbia, and joint-use (*i.e.*, treaty and non-treaty) fishing rights on the Columbia above Bonneville Dam. Some of the fish entering the Lower Columbia terminate their run there, and some proceed upstream to the area above the dam. The State has asserted, and the federal courts have ruled, that the non-treaty fishermen may harvest all those fish that would not migrate above the dam in any event. The treaty fishermen may take a maximum of 50% of the fish passing through the area of exclusive non-treaty fishing and into the joint-use area. See *Sohappy* v. *Smith*, 529 F.2d 570, 572 (9th Cir. 1976).

Petitioner alleges (Pet. 26-27) that the disposition below is unworkable because it is impossible to "protect" the "through fish" from the Quinault net fishery as they pass through the reservation mixed with "reservation fish." As the magistrate noted (Pet. App. B23-B24), this concern is no obstacle to the allocation adopted below. True, when a fish is taken on the reservation, it is not possible to identify it as a "reservation" or "through" fish. But it is not necessary to do so to effect the allocation. It is possible to predict the total number of steelhead that will enter the Quinault River during a given annual run, the proportions of "reservation" and "through" fish, and the proper harvest levels. The

2. Petitioner's attempt to take advantage of *Montana* v. *United States*, 450 U.S. 544 (1981), is equally unavailing. Notwithstanding the conclusion of the court of appeals that "the exact limits of the *Montana* holding are not clear" (Pet. App. A8), it is evident, as Judge Canby recognized in his concurring opinion (*id.* at A9), that the factors deemed significant by the Court in *Montana* are not present here.

In *Montana*, the Court examined a different treaty, the Treaty of Fort Laramie, June 1, 1868, United States-Crow Indians, 15 Stat. 649. After reviewing the treaty negotiations and the history of the Crow people and their reservation, the Court concluded that the bed and banks of the Big Horn River belonged to Montana and that the Crow, therefore, could not prohibit non-Indians from fishing on the river. At least two factors forcefully distinguish this case from *Montana*.

First, the Court in *Montana* noted that the Crow treaties did not even mention the riverbed or in any other manner signal a definite intent to grant it along with the reservation's uplands (450 U.S. at 552-555). Manifestation of such an intent would have overcome the presumption that at the time the treaties were signed the riverbed was held in trust for the future state (*id.* at 553). The history of the Quinault Reservation is entirely different. In 1873, the reservation's boundaries were redrawn so as to include the whole of Lake Quinault and its fisheries within the reservation in order to protect these fisheries from encroachment by non-Indians. *The Quinaielt Tribe of Indians* v. *United States*, 102 Ct. Cl. 822, 825 (1945). The Secretary of the Interior had noted in 1872 the need for additional fisheries for the Indians of the

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Fisheries Advisory Board can, on the basis of these data, apply the allocation and determine the share of each group in any given season. Steelhead can then be credited against those shares, wherever harvested. See also *id.* at B2, B28-B29; C4-C5.

reservation and recommended expansion to include the lake to meet this need, see 1 *Report of the Secretary of the Interior, reprinted in* H.R. Exec. Doc. No. 1, 42d Cong., 3d Sess. 723-725 (1872), and the lake was included in response to this recommendation. The background of this expansion thus clearly supplies the manifestation of intent required to overcome the presumption of retention for the future state.

Second, in *Montana* the Court noted that fishing was not important to the Crows' diet or way of life when the treaties were signed, and that therefore there was no indication that Congress departed from its policy of reserving the beds of navigable waters for future states (450 U.S. at 556). By contrast, it is undisputed that fishing was and remains central to the Quinaults' diet and culture. See *Fishing Vessel, supra,* 443 U.S. at 664-665; *Halbert* v. *United States,* 283 U.S. 753, 757 (1931); *United States* v. *Washington, supra,* 384 F.Supp. at 350-358.

Given these factual distinctions, the court of appeals correctly concluded that this case is controlled by *Confederated Salish & Kootenai Tribes* v. *Namen,* 665 F.2d 951 (9th Cir.), cert. denied, No. 82-22 (Nov. 1, 1982).[8] As in *Namen,* the factual distinctions between the history of the Quinaults and that of the Crow are so clearly apparent that there is no warrant for further review by this Court.[9]

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[8]In *Namen,* the court held that the Indians have a beneficial ownership interest in the south half of Flathead Lake because the treaty creating the Flathead Reservation expressly included that portion of the lake in delineating the reservation's boundaries and the Indians were dependent on fishing when the treaty was executed (see 665 F.2d at 960-962).

[9]At all events, State ownership of the bed and banks of the Quinault River and Lake Quinault would not necessarily deprive the tribe of exclusive fishing rights within its reservation boundaries. Unlike *Montana,* this case presents no issue of the tribe's authority over non-Indian fishermen, nor federal prosecution under 18 U.S.C. 1165.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1983

DOJ-1983-05

NO. 82 - 1507

IN THE

Supreme Court of the United States

October Term, 1982

WASHINGTON STATE DEPARTMENT OF GAME, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA

and

QUINAULT INDIAN NATION, et al.,

Respondents.

On Writ Of Certiorari To The
United States Court of Appeals
For The Ninth Circuit

QUINAULT INDIAN NATION'S BRIEF IN OPPOSITION

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Respondent, Quinault Indian Nation, respectfully requests that the Petition for Writ of Certiorari filed by Petitioners, State of Washington and Washington Department of Game be denied.

QUESTIONS PRESENTED [1/]

1. Under this Court's decisions in Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979) and Puyallup Tribe v. Washington Department of Game, 433 U.S. 165 (1977), is the State of Washington entitled to a 50% share of the anadromous fish runs which have entered the Quinault Indian Reservation never to leave again, and which

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[1/] Petitioner State's formulation of the questions presented differs significantly from those it presented to the Court of Appeals which are reprinted in Appendix A hereto. See Brief of Appellant State of Washington in the Court of Appeals at 1. Petitioners should not be permitted to raise their Question No. 1 which was not decided by the court of appeals or district court for the first time before this Court. See infra at 14-16.

therefore can only be harvested by opening the Quinault Indian Reservation on which the Quinault Nation has always excercised exclusive fishing rights to fishing by non-Indians, thereby overriding the Tribe's exclusive fishing right?

2. Should the district court have enjoined the Quinault Tribe's on-reservation fishery in the absence of a showing that such a curtailment would either (a) be necessary for the preservation of the resource, or (b) significantly increase the opportunity for the nontreaty fishermen to harvest a greater portion of their allocation consistent with permitting a full harvest of the harvestable portions of the run?

LIST OF PARTIES TO PROCEEDING

Respondent, Quinault Nation, concurs in the State's listing of the parties.

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TABLE OF AUTHORITIES

Other Authority

OPINION BELOW

Petitioners statement and presentation of the opinions below in the Appendices to the Petition are correct with the following caveat. The district court's May 8, 1981 Order modified the recommended findings of fact contained in the Magistrate's Report and Recommendation "by deleting the last sentence of the next to last paragraph [of the section designated 'Factual Setting'] (lines 8-10 of p. 5 of the Report)." See Order of May 8, 1981, Petition Appendix C at 3.

Because Petitioners reprint the Magistrate's Report and Recommendation in Appendix B without line numbering and with different pagination from the original it is difficult to identify the modification as presented in the Petitioner State's Appendix. The deleted sentence which was unsupported by the record appears at page 10 of Appendix B to the Petition and reads:

"Others own fee patent land on the river within the reservation, and fish there for steelhead."

JURISDICTION

Respondent, Quinault Nation, does not disagree with Petitioner's statement.

TREATIES INVOLVED

Respondent, Quinault Nation, does not disagree with Petitioner's statement.

STATEMENT OF THE CASE

Washington initiated the proceeding giving rise to the instant Petition by invoking the continuing jurisdiction of the District Court for the Western District of Washington in United States v. Washington, 384 F.Supp. 312, 419 (W. D. Wash 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976). Washington sought to enjoin on-reservation fishing by members of the Quinault Nation on 1980-81 winter run Quinault River steelhead and to enjoin the Nation from promulgating further

regulations authorizing the fishery. The magistrate's recommendation (Petition Appendix B) that the State's motion be denied was approved by the district court with modifications. (Petition Appendix C) Washington appealed the denial of the preliminary injunction and the court of appeals affirmed in an opinion reported at 693 F.2d 188. (Petition Appendix A).

Knowledge of the facts is necessary to understand this case. Indeed, the result in this case turns on its unique facts; the application of well-established legal principles to those facts being quite straightforward.

Prior to treaty times and ever since the Quinaults have relied on the salmon and steelhead runs in the Quinault River for their livelihood. United States v. Washington, supra, 384 F.Supp. at 374-75. The Quinault Reservation was established, pursuant to Article 2 of the Treaty of

Olympia, 12 Stat. 971, by Executive Order of November 4,1873, I Kappler, Indian Affairs Laws and Treaties, 923 (1904). Its size and location in the Quinaults' ancestral territory are a product of, among other things, the desire of federal authorities to provide a permanent homeland with exclusive fisheries for the Indians who were heavily dependent on fishing for their livelihood. Halbert v. United States, 283 U.S. 753, 757 (1931); The Quinaielt Indians, 102 Ct.Cl. 822, 825 (1945).

The Reservation thus includes the entire 34 miles of the Lower Quinault River, all of Lake Quinault, and a number of other rivers and streams. The Quinaielt Indians, supra; Executive Order of November 4, 1873, I Kappler, Indian Affairs Laws and Treaties, supra. The Quinault River, however, originates upstream of Lake Quinault in lands outside of the Reservation. This portion of the Quinault River outside of the

Reservation will be referred to as the Upper Quinault River. A sketch map of the Quinault Reservation is attached hereto as Appendix B.

Steelhead are anadromous fish and like salmon hatch in fresh water, migrate to the ocean where they rear and reach mature size, and eventually complete their life cycle by returning to the freshwater place of their origin.[2/] The steelhead run on the Quinault River is an annual run that returns to the river in the winter. About 85% of the run spawns or returns to tribal or federal hatcheries on the Reservation in the Lower

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2/ While steelhead do not necessarily die upon spawning, "[t]he frequency of survival beyond the first spawning is low.... Because of the extremely low survival, repeat spawners are considered of only minor significance in managment of the species." Exhibit JX-2a. Joint Statement Regarding the Biology, and Harvest of the Salmon and Steelhead Resources of the Puget Sound and Olympic Penninsular Drainage Areas of Western Washington, prepared by Washington Departments of Game and Fisheries and the United States Fish and Wildlife Service.

Quinault River and its tributaries. The remaining 15% of the run spawns in the Upper Quinault River upstream of the Reservation. Due to the nature of these fish 85% of the run, once it has returned to the Reservation, will not leave the Reservation and re-enter off-reservation fishing areas, either below or above the Quinault Reservation. See Petition Appendix B at 7-8. These fish were designated "reservation fish" by the district court because they are either harvested or spawn and die on the Reservation. The remaining 15% of the run which is produced off the Reservaton are designated "through fish" because they pass through the Reservation on their way to off-Reservation spawning grounds where they are available for harvest by non-treaty fishermen. Id.

Both reservation and through fish are subject to harvest at several locations. In the ocean they are available for harvest by

both treaty and non-treaty fishermen. On the Quinault Reservation when the fish enter the Quinault River they are harvested in a tribal commercial net fishery in the lower 6 miles of the river. The only other on-reservation fishery is a tribally managed sport fishery in which non-Indians may participate by hiring tribally licensed Indian guides. Participation in this on-reservation sport fishery is now, and always has been, exclusively regulated by the Tribe to meet conservation requirements and the Tribe's management objectives.

On the Upper Quinault River, off the Reservation, there is a non-Indian sport fishery which harvests "through fish." This non-treaty fishery is regulated exclusively by the State. Quinault tribal members do not fish the Upper Quinault which is closed to treaty fishing by tribal regulation.

Washington sought an injunction to close the tribal fishery on the Lower River,

within the Reservation, at 50% of the harvestable steelhead, claiming that the 50-50 sharing rule applies to both "reservation" and "through" fish in the Quinault River steelhead run wherever they are found throughout their life cycle.

The district court denied the motion, holding that the 50-50 principle applies to the Upper River "through" fish, but not to Lower River "reservation" fish that will not leave the Quinault Reservation where the Tribe's fishing rights are exclusive.

The district court concluded that closure of the treaty fishery was unwarranted because "reservation" fish whether or not caught by treaty fishermen will never leave the Quinault Reservation. These fish are simply not available for harvest by non-treaty fishermen, who have no access to them once they return to the reservation where they were produced.

As for "through" fish, no closure was

warranted because the district court found no evidence that the tribal fishery in any way impinged on the non-treaty fishermen's opportunity to harvest their share of the small number of fish passing through the Quinault Reservation to the sport fishery on the Upper River. See Petition Appendix B at 26. This finding of fact was not challenged on appeal.

Washington's assertion that the ownership of the uplands bordering Lake Quinault and the Quinault River is "important to this case" is incorrect and an attempt to recast the issues on appeal. The State's claim in this case has never focused on the rights of individual upland landowners. Rather, it is a very broad claim that the non-Indian public is entitled to harvest 50% of the Quinault River Steelhead, including both "reservation" and "through" fish.

Throughout this case, the State has

urged that it is entitled to 50% of the Quinault River steelhead to provide fish for all the State's "sport fishermen" including nonresidents coming from "metropolitan areas." Indeed, Washington has sought to curtail tribal fishing because the State believes such curtailment will attract the non-Indian pulblic to the Quinault River.

Notwithstanding the fact that there are non-Indian landowners within the Reservation, none is before the Court and the State advanced no claims specifically on their behalf below. Indeed, no record was developed to support or consider such claims in the district court. While the magistrate accepted a State assertion that non-Indians fish from fee land within the reservation, (Petition Appendix B at 10) the district court deleted that finding in its order adopting and approving the magistrate's report for lack of any evidentiary support in the record. The district court therefore

did not consider the claim that the State attempts to raise here because such a claim was never presented for decision by the record before it.[3/]

[3/] The landownership "facts" the State presents in the Petition at 18 with respect to landownership around Lake Quinault were not before the district court. Facts pertaining to land ownership of both the on and off-reservation uplands around Lake Quinault were provided to the court of appeals pursuant to a post-argument order. See Order of July 14, 1982, Appendix C hereto. The court of appeals opinion, however, does not appear to have relied on those facts, nor does it appear from the opinion below that the court ultimately found them relevant to the issues in the case. Furthermore, the ownership pattern of the uplands around the lake can be misleading. The uplands surrounding the lake are partly within and partly without the Quinault Indian Reservation. As the accompanying map, Appendix A, and the survey maps reproduced as Appendices to the opinion in The Quinaielt Indians, 102 Ct. Cl. 822 (1945) show the Reservation boundary was drawn by the United States at the lakeshore for most of the distance around the lake so that the uplands at the southwestern end of the Reservation and the entire lake are within the Reservation while the remaining uplands are outside of the Reservation. Most of these off-reservation riparian uplands (87%) are part of the Olympic National Park or Forest. As for the on-

(footnote continued on next page)

FEDERAL COURT JURISDICTION

The Quinault Nation does not disagree with the Petitioners' statement.

REASONS FOR DENYING THE WRIT

The questions properly raised by this case are plainly insubstantial. As the Court noted when this case was before it in 1979, "notwithstanding the bitterness that this litigation has engendered, the principal issue involved is virtually a 'matter decided.'" Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979). If anything, that characterization applies with more force to this dispute.

The Quinault on-reservation fishery which Washington seeks to limit does not affect non-treaty fishermen's opportunity to

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(footnote continued from previous page)
reservation upland around the lake, while the State indicates less than half is held in trust, the majority is owned by the Quinault Nation or its members in either trust or fee status.

harvest Quinault River steelhead in the ocean. It does not impinge on the non-treaty fishermen's opportunity to harvest their share of those Quinault River steelhead which are produced upstream of the Quinault Reservation, and pass through the Reservation on their way to the non-Indian sport fishery on the Upper Quinault River. See Petition Appendix B at 26. Instead, Washington sought to enjoin the Quinault on-reservation fishery to prevent the harvest of fish produced on the Quinault Reservation which return to the Reservation and would never leave it absent any fishery.

Both Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n., 443 U.S. 658 (1979) and Puyallup Tribe v. Washington Department of Game, 433 U.S. 165 (1977) hold that an on-reservation treaty fishery is subject to restrictions to the extent necessary to protect other citizens right to fish off the reservation. The

district court and court of appeals, see Judge Canby's concurring opinion, both applied that principle and held that the non-treaty fishermen are entitled to 50% of harvestable fish passing through the Quinault Reservation to upstream fishing areas off the Reservation. The district court, however, found that Washington had presented no evidence that the Quinault fishery within the Reservation impinged on the non-treaty fishermen's opportunity to harvest their share of those fish.

The vast majority of the Quinault River steelhead run, however, enters the Quinault Reservation and will never leave it. With respect to those fish it is well settled and res judicata as to Washington, that the Quinault Nation possesses an exclusive right to fish on its Reservation. Therefore the courts below properly concluded Washington has no further opportunity to harvest this portion of the run once it has entered the

Reservation.

More than 50 years ago in Pioneer Packing Co. v. Winslow, 159 Wash. 655, 294 P. 557 (1930), the Supreme Court of Washington held:

> After considering the provisions of treaty and the cases cited, we are of the opinion that in the present case the Quinault Indians own the fish in the Quinault River by the same title and in the same right as they owned them prior to the time of the making of the treaty, and that the state has no right to interfere with or control their right to take fish from a stream which crosses the reservation.
>
> In Mason v. Sams, 5 Fed. (2d) 255 [1925], the Federal District court for the western district of this state expressed views similar to those which we entertain, as above set forth.

Id., 159 Wash. at 662.

More recently, in this case the district court in its initial decision held:

> An exclusive right of fishing was reserved by the tribes within the area and boundary waters of their reservations ....

United States v. Washington, 384 F. Supp. at 332 and n.12 (Emphasis in original, footnote omitted.)

Only four years ago in reviewing a series of orders in this case this Court confirmed the district court's holding:

> [I]t is clear that the Tribe may exclude non-Indians from access to fishing within the reservation ....

Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 683-84 (1979); See also, Id., at 684 and 687. Indeed, while the Court was divided on the issue of off-reservation fishing rights, with respect to on-reservation fishing rights the decision was unanimous:

> In addition, the Indians retained the exclusive right to take fish on their reservations, a right not involved in this litigation.

Id. at 698. (Justices Powell, Stewart, and Rehnquist dissenting.) It is simply too late in the day for Washington to challenge the Quinault Nation's exclusive right to fish on its Reservation, where the Quinault Indians have always exercised exclusive

fishing, rights and to seek to open the Reservation to non-Indian fishing subject to State regulation.

Finally, the State makes much of Montana v. United State, 450 U.S. 544 (1981). But, given the long recognition of exclusive Quinault on-reservation fishing rights, any question with respect to title to the reservation's submerged land is plainly insubstantial. Unlike the Crow Reservation, the Quinault Reservation was established for Indians wholly dependent on fishing. Thus, this case comes clearly within the Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918), line of cases recognized in Montana v. United States, supra, at 556.

Indeed, there has been little dispute over ownership of submerged lands within the Quinault Reservation. For over 50 years the State has agreed that ownership of the submerged lands within the Quinault

Reservation was reserved by the United States for the exclusive benefit of the Tribe. In a published opinion issued in 1928 Washington's attorney general analyzed ownership of the submerged lands in the Quinault Reservation under the test enunciated in United States v. Holt State Bank, 270 U.S. 49 (1926) and concluded:

> We believe ownership of such beds and shores, and, as incident thereto, jurisdiction over the waters themselves, was intended to be reserved by the United States exclusively for the Indians. ... [I]f our conclusion in respect to the latter question were to the contrary, obviously it must also be held that the state has power to regulate fishing in the disputed waters, a holding which we are satisfied would serve to defeat the primary object of the government in establishing the reservation.

1927-28 Opinions of the Attorney General of the State of Washington, 783, 788 (June 22, 1928).

Washington offers no reason why this Court's conclusion in Montana based on very different facts should compel

reconsideration of settled expectations with respect to ownership of submerged lands in the Quinault Reservation. See Oregon v. Corvallis Sand & Gravel Co, 429 U.S. 363 (1977); Confederated Salish and Kootenai Tribes v. Namen, 665 F.2d 951 (9th Cir. 1982), cert. denied, U.S. ,103 S.Ct. 314 (1982). And, Washington offers no reason why it should be allowed expand United States v. Washington and change it from a fishing case to a title case at the appellate level.

CONCLUSION

For the above reasons the petition for writ of certiorari should be denied.

Dated this 9th day of May, 1983.

Respectfully submitted,

Richard Reich

Richard Reich
Office of Reservation Attorney
Quinault Indian Nation

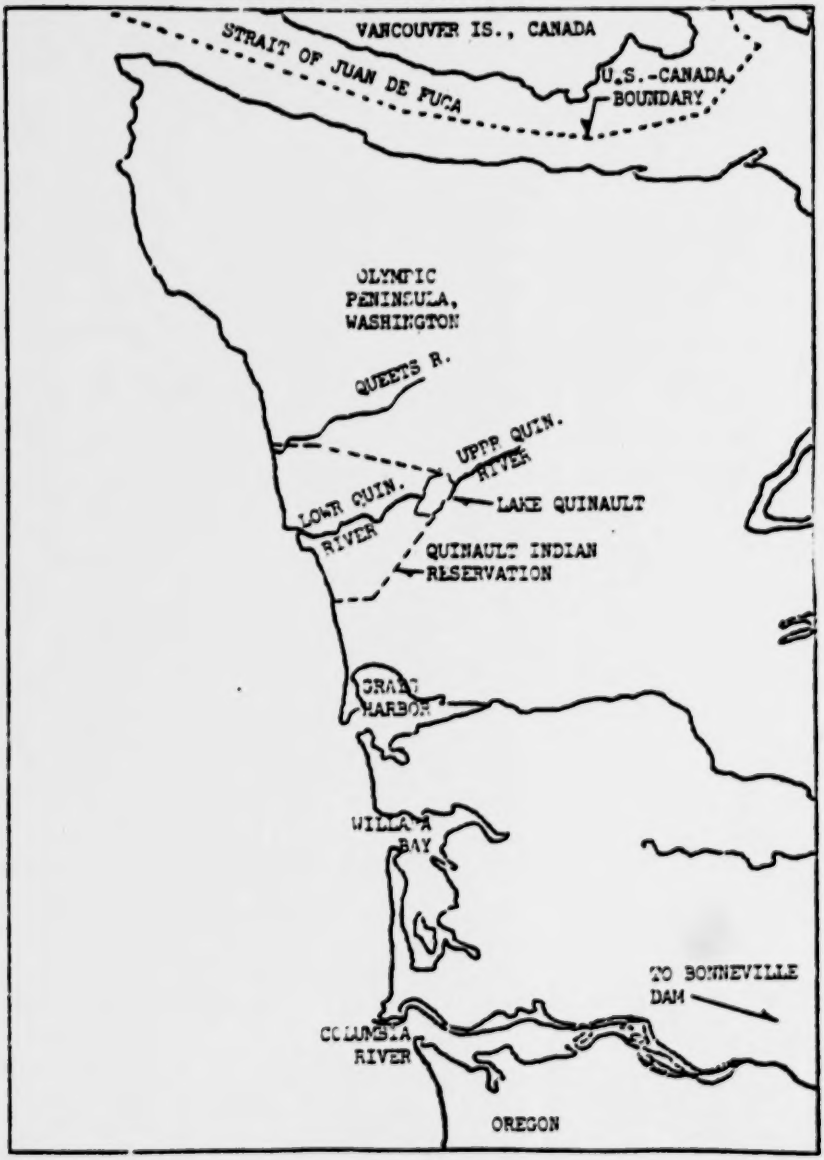
Excerpt from Brief of Appellant Washington in this case in the Court of Appeals

"STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the decisions of the United States Supreme Court including Puyallup Tribe v. Washington Department of Game, 433 U.S. 165 (1977) and Washington v. Washington State Commercial Passenger Fishing Vessel Assn., 443 U.S. 658 (1979), limit the Quinault Indian fisheries to a 50% maximum catch of the harvestable steelhead trout run in the Quinault River? Should (must) the federal court with continuing jurisdiction over this fishery implement this limitation in the face of tribal refusal to stop its fishery?"

Brief of Appellant State of Washington in the Court of Appeals at 1. United States v. Washington, C.A. No. 81-3502

MAP OF OLYMPIC PENINSULA AND QUINAULT INDIAN RESERVATION



Appendix B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, et al.,	)	
Plaintiffs-Appellees,	)	No. 81-3502
v.	)	ORDER
STATE OF WASHINGTON, et al.,	)	Filed July 14, 1982
Defendants-Appellants.	)	

Before: WRIGHT, KILKENNY and CANBY, Circuit Judges

Counsel for the parties in this case are hereby ordered to submit, in writing within ten (10) days of the filing of this order, their contentions as to the number, nature, and extent of individual parcels of land bordering Lake Quinault on the Quinault Indian Reservation held in fee by non-indians.

BY ORDER OF THE COURT:

Phillip B. Winberry
Clerk of Court

By: Cathy A. Catterson
Deputy Clerk

Appendix C